

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STATE OF MISSOURI,

Respondent

v.

JAMES CALVIN SMITH.

Appellant

DOCKET NUMBER WD77673

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: November 17, 2015

Appeal From:

Circuit Court of Pettis County, MO
The Honorable Robert Lawrence Koffman, Judge

Appellate Judges:

Special Division
James Edward Welsh, P.J., Gary D. Witt, J., and Andrea R. Vandeloecht, Sp. J.

Attorneys:

Amy Bartholow, Columbia, MO

Counsel for Appellant

Attorneys:

Shaun Mackelprang, Jefferson City, MO

Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

**STATE OF MISSOURI, Respondent, v.
JAMES CALVIN SMITH, Appellant**

WD77673

Pettis County

Before Special Division Judges: Welsh, P.J., Witt, J., and Vandeloecht, Sp. J.

James Smith appeals his convictions, following a jury trial, of one count of first-degree burglary, three counts of second-degree burglary, and two counts of felony stealing. He challenges the circuit court's refusal to submit an instruction for first-degree trespass as a lesser-included offense on one count of burglary in the first degree and on three counts of burglary in the second degree. He also challenges the court's refusal to submit an instruction for misdemeanor stealing as a lesser-included offense of felony stealing.

Reversed and remanded.

Special Division holds:

The circuit court committed reversible error in failing to instruct the jury on the lesser-included offense of first-degree trespass on the first-degree burglary count and the three second-degree burglary counts. Such an error creates a presumption of prejudice, which, despite the State's claim to the contrary, was not rebutted. Smith's convictions on those four counts are vacated and the cause is remanded for further proceedings.

The State concedes that the court's refusal to give the lesser-included instructions for misdemeanor stealing on the two felony stealing counts was reversible error, and it concedes that the circuit court's judgment as to those two counts of felony stealing should be reversed. The State is correct and, thus, those convictions are vacated and remanded as well.

Opinion by James Edward Welsh, Presiding Judge

November 17, 2015

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